MEGAH KEPONG SDN BHD & ANOR A

v.

PERSATUAN PENGANUT DEWA SU LIM KONG KEPONG, KUALA LUMPUR & ORS B

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: S7-22-1725-2004]
2 DECEMBER 2013 C

CIVIL PROCEDURE: *Costs - Getting up fee - Application to review taxation of costs - Consolidated actions - Rule in representation of two or more litigants in separate actions - Whether same amount of getting up fees - Whether solicitor entitled to claim ten times in getting up fees for representing ten defendants - Whether quantum awarded excessive - Rules of the High Court 1980, O. 59 r. 36(1)* D

This was the plaintiffs' application to review the taxation of costs by the Senior Assistant Registrar ('SAR') pursuant to O. 59 r. 36(1) of the Rules of the High Court 1980 ('RHC'). A sum of RM70,000 each was awarded as getting up fees in favour of the first, second and ninth defendants by the SAR. In her grounds of decision, the SAR explained that the quantum was awarded to the said defendants as it involved complex issues and was guided by similar awards made in favour of the other defendants. Dissatisfied with the decision, the plaintiffs applied for the judge to review the award of the SAR. The plaintiffs contended that in assessing the quantum that ought to be awarded to the first, second and ninth defendants, the SAR had completely disregarded the costs that was awarded to the other defendants, thus, erred in the exercise of her discretion and urged the court to reduce the amount to a reasonable figure. Further, the plaintiffs submitted that apart from the fourth defendant, the first to the tenth defendants were represented by the same set of solicitors and had filed identical defences, took identical objections to the plaintiffs' application for injunction and filed identical applications to strike out the plaintiffs' suit. Hence, the issue that arose for consideration was whether a solicitor was entitled to be paid getting up fees ten times over for the same work on the grounds that ten defendants represented by the solicitor had won the case brought against them by the plaintiffs. E F G H I

Held (dismissing appeal with no order as to costs):

(1) There is a rule which permits a solicitor who represents two or more litigants in separate actions, to be entitled to the same amount as getting up though the same work was done in each case. The exception to this rule applies when these separate actions are consolidated. In the present case, there was only one action that the plaintiffs had commenced against the 11 defendants. In the circumstances, the exception to the general rule would apply. (paras 23 & 24)

(2) The defendants were not entitled to claim three times over as getting up for the same work done. It was imperative to ensure that unsuccessful litigants should not be oppressed by having to pay an excessive amount of costs. (para 25)

(3) The objection that the defendants were only entitled to claim for getting up fees in relation to one defendant had been taken and rejected thrice. These were decisions that could have been challenged on appeal, but was not done and no explanation had been proffered for this omission. In the absence of such explanation, it was reasonable to assume that the plaintiffs did not dispute the correctness of the decisions. This court had no option but to dismiss the plaintiffs' application for review. (para 27)

(4) To avoid inconsistent decisions on the same issue, the court was unable to accede to the request for the reduction of the amount awarded as getting up fees. It would be unjust to deny the first, second and ninth defendants the same quantum of costs awarded to the other defendants. This court had no option but to dismiss the plaintiffs' application for review. (para 27)

Case(s) referred to:

Aw Yong Wai Choo v. Arief Trading Sdn Bhd & Anor [2001] 1 CLJ 816 HC ***(refd)***

Gooi Hock Seng v. Chuah Guat Khim [2001] 1 CLJ 583 SC ***(refd)***

Oppenshaw v. Whitehead, Mucklow v. Same 9 ER 163 (1854) 9 Ex 384 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (c), (d), O. 59 rr. 34(1), 35(3), 36(1)

Societies Act 1966, s. 9(c)

For the plaintiff - Nor Akhfa Jalal (Mahathir Abdullah with her); M/s Abd Aziz Chen & Co
For the defendant - Ng Chek; M/s Ng Chek & Co

Reported by Shah Saharudin

JUDGMENT

SM Komathy Suppiah JC:

[1] The particular question that arises in this taxation review proceedings is whether a solicitor is entitled to be paid getting up fees ten times over for the same work because the ten defendants represented by him in the present action have won the case brought against them by the plaintiffs.

[2] On 25 April 2012 the learned Senior Assistant Registrar allowed a sum of RM70,000 each as getting up fees in favour of the first, second and the ninth defendants, *inter alia*, on the ground that the other defendants to this action have been awarded the same amount for this item. The first and second plaintiffs applied to review the amount allowed by the learned Senior Assistant Registrar pursuant to O. 59 r. 36(1) of the Rules of the High Court 1980 ("RHC").

The Background Facts

[3] In order to appreciate the arguments taken on behalf of the parties, I set out the background facts leading to the first, second and ninth defendants filing their separate bills of costs for taxation. The first plaintiff is the registered owner of the three pieces of land held under Lot 415, Geran Mukim 5911 (previously EMR 4862). Lot 416, Geran Mukim 5910 (previously EMR 4861) and Lot 417, Geran Mukim 5912 (previously 6082) in Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("the said lands").

[4] The second plaintiff was given the rights to develop the said lands into the development known as Taman Megah Kepong II.

[5] The first defendant is a Taoist temple registered under the Societies Act and occupies a portion of the said lands. The second to the tenth defendants were office bearers and trustees in the first defendant. The eleventh defendant is an individual who occupies a portion of the said lands.

[6] The present suit was instituted against the defendants seeking their eviction from the said lands with an injunction to restrain the defendants from occupying the same. In addition, the plaintiffs sought supplementary relief for special damages in the sum of RM7.46 million and general damages to be assessed as against each and every defendant, with the second to the tenth defendants being sued in their capacity as office bearers of the first defendant at the material time.

[7] The plaintiffs applied for an injunction against the defendants which was subsequently dismissed with costs.

[8] The defendants then applied to strike out the plaintiffs' claim under O. 18 r. 19(1)(a), (c) and (d) of the RHC on the ground that the plaintiffs had failed to comply with s. 9(c) of the Societies Act 1966 in instituting this action. This provision expressly deals with the manner in which a litigant can bring an action against a registered society. On 19 August 2005, the said application was allowed with costs. The claim against the defendants, including the first, second and ninth defendants was consequently struck out.

[9] The first, second and ninth defendants then each filed three separate bills of costs that related to taking instructions to file defence, dismissal of the plaintiff's application for an injunction and the striking out of the plaintiff's claim.

[10] On 25 April 2012, the three bills of costs were taxed by the Senior Assistant Registrar who awarded each of the defendant RM70,000 as getting-up fees. The plaintiff being dissatisfied with the amount awarded, applied for the award to be reviewed by the Senior Assistant Registrar in accordance with O. 59 r. 34(1) of the RHC. The review was sought on the ground that the amount awarded was excessive as the defendants were represented by the same solicitor. Upon reviewing the award on 17 July 2012, the Senior Assistant Registrar confirmed it.

[11] In accordance with O. 59 r. 35(3), the plaintiffs requested the reasons for the Senior Assistant Registrar's decision on the review and applied for the judge to review the award of the Senior Assistant Registrar pursuant to O. 59 r. 36 of the RHC.

[12] In her grounds of decision, the Senior Assistant Registrar explained that she confirmed the quantum awarded as the case involved complex issues and was guided by the similar awards made in favour of the other defendants to this action, which awards had been confirmed on appeal.

Items Of Bills Objected To By The Plaintiffs

[13] The plaintiffs have filed this appeal against three specific items appearing in the respective bills of costs, which are:

First Defendant

a) Item No. 57, Scale of Costs (O. 59 RHC 1980) matter no. 26 – sum awarded RM20,000

b) Item No. 58, Scale of Costs matter no. 26 – sum awarded RM25,000

c) Item No. 59 & 60, Scale of Costs matter no. 26 – sum awarded RM25,000

Second Defendant

a) Item No. 47, Scale of Costs (O. 59 RHC 1980) matter no. 26 – sum awarded RM20,000

b) Item No. 48, Scale of Costs matter no. 26 – sum awarded RM25,000

c) Item No. 49 & 50, Scale of Costs matter no. 26 – sum awarded RM25,000

Ninth Defendant

a) Item No. 36, Scale of Costs (Order 59 RHC 1980) matter no. 26 – sum awarded RM20,000

b) Item No. 37, Scale of Costs matter no. 26 – sum awarded RM25,000

c) Item No. 38 & 39, Scale of Costs matter no. 26 – sum awarded RM25,000

The items claimed for by the respective defendants appear to be in respect of identical areas of work and are as follow:

First defendant (Item 57), second defendant (Item 47), ninth defendant (Item 36)

Taking instructions in respect of the plaintiffs' writ of summons and statement of claim weighing the facts and the law, filing a defence, entering into correspondence.

First defendant (Item 58), second defendant (Item 48), ninth defendant (Item 37)

Taking instructions in respect of the plaintiffs' injunction application, weighing the facts and the law, entering into correspondence.

First defendant (Item 59 & 60), second defendant (Items 49 & 50), ninth defendant (Item 38 & 39)

Taking instructions in respect of the defendants' applications under O. 18 r. 19(1)(a) and (c), weighing the facts and the law, entering into correspondence.

The Applicable Law

[14] The principles applicable to taxation review proceedings under O. 59 r. 36 are well settled by a series of authorities. It would suffice to quote a passage in the judgment of Abdul Malek Ahmad FCJ in *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583 on the subject. His Lordship quoted with approval a passage in Malaysian Court Practice High Court vol. 1 as to when a review under O. 59 r. 36 of the RHC will be allowed at p. 588:

> The phrase 'as the circumstances require' in r. 36(5) confers on the judge a discretion which is to be judicially exercised. The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error and for this purpose, a broad overview of the matter should be taken.
>
> Hence, the hearing before the judge is not a rehearing but is a review: *Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors (no. 2)* [1993] 1 SLR 542.
>
> The court will not interfere with the decision of the taxing registrar upon a mere question of quantum if the taxing registrar has exercised his discretion after consideration of all the circumstances and if no question of principle arises.

It is only when the taxing registrar's decision has been exercised on some wrong principle or the quantum allowed is obviously wrong that the judge will interfere: *Starlite Ceramic Industry Ltd. v. Hiap Huat Pottery* [1973] 1 LNS 143.

The judge should not interfere unless there is an error of principle or some other material error: *Diversey (Far East) Pte Ltd v. Chester Chei Chung Ching & Ors. (No 2)* above, or unless the registrar has made an obvious mistake, or has exercised his discretion capriciously or mischievously: *Corbett v. Ipoh Tin Dredging Ltd* [1936] MLJ 278.

Decision

[15] As stated at the outset, there are eleven defendants to this action. It is common ground that on 9 April 2010, Datin Zabariah binti Mohd Yusof J confirmed the award of the Senior Assistant Registrar awarding the tenth defendant herein getting up fees amounting to RM70,000 for the same three items. It is also common ground that on 19 August 2011, Dato' John Louis O'hara J confirmed similar awards made in favour of the fifth and seventh defendants. Equally, it is not in dispute that Dato' Su Geok Yam J on 19 July 2012 also confirmed similar awards made in favour of the third to the sixth defendants. Each of the defendants was thus awarded RM70,000 as getting up fees.

[16] Counsel for the plaintiffs submitted that the first to the tenth defendants (apart from the fourth defendant) have been represented by the same set of solicitors and filed in essentially identical defences, took essentially identical objections to the plaintiff's application for injunction, and filed essentially identical applications to strike out the plaintiffs' suit. In the premises, any award of costs ought to take into account the above facts to avoid multiplication and escalation of costs. He contended that in assessing the quantum that ought to be awarded to the first, second and ninth defendants, the Senior Assistant Registrar had completely and without justification, disregarded the costs already awarded to the third, fifth, sixth, seventh, eighth and tenth defendants. It was said that in so doing, she had erred in the exercise of her discretion. As a result, the quantum of overall costs against the plaintiffs has become a sum which is grossly disproportionate to the work undertaken for the defendants by the solicitors.

[17] In this context, counsel for the plaintiff pointed out that as the other defendants have all been awarded the same quantum of costs individually for the same three items, the total amount of costs awarded against the plaintiffs in this suit is a staggering RM630,000. He urged the court to reduce the amount awarded by the Senior Assistant Registrar to a reasonable figure, taking into account the facts as set out in para. 12 to arrive at a more equitable award of costs globally.

[18] In response, counsel for the defendants pointed out that the same submission had been unsuccessfully taken by the plaintiffs before the three judges who had heard and dismissed their appeals on quantum on the costs awarded to the other defendants. It is argued that the plaintiff is barred from raising the same issue again based on the doctrine of issue estoppel.

[19] In the alternative, it is contended that there is no rule that prohibits a solicitor who represents two defendants from claiming the same charges on behalf of each defendant. In support of this proposition, he alluded to *Oppenshaw v. Whitehead, Mucklow v. Same* 9 ER 163 (1854) 9 Ex. 384 and *Aw Yong Wai Choo v. Arief Trading Sdn Bhd & Anor* [2001] 1 CLJ 816, [2001] 5 MLJ 526.

[20] The facts in *Oppenshaw (supra)* were as follows. Two actions were brought and won on substantially the same ground by two plaintiffs who were injured by the bursting of a boiler belonging to the owner. The plaintiffs were both represented by the same counsel. When the plaintiffs' submitted their respective bills of costs to be taxed, the taxing master refused to tax each bill separately on the ground that the counsel was not entitled to be paid twice over for the same work. On review to the Court of Exchequer, Pollock CB disagreed and ruled in favour of the plaintiffs' as there had been no consolidation of the two cases. He enunciated the rule as follows:

> In these cases, rules *nisi* were obtained to review the taxation of the master, which had been made on the principle that there had been the same attention and care expended or labour bestowed in preparing the briefs, the same attorney being concerned for the plaintiffs in both cases. We certainly are very desirous, if it were possible, to make any arrangement that would be productive of economy in the administration of justice; but upon considering the case with the greatest attention, we find it impossible to lay down any rule that shall lead to that, without creating more litigation and

> more expense in discussing the application of it than, probably, money would be saved by the adoption of any such rule; and we are of the opinion that where the business is actually done, the master ought not to take into consideration that the same attorney was employed by two parties, unless there is a consolidation. If there is a consolidation, that may make all the difference; but, if the business is really done, although there are two causes, and the same attorney be employed by both parties, we think that there is no ground for reducing the ordinary and fair charge which an attorney may make against his client in each case.

[21] Counsel for the defendant pointed out that the rule enunciated in *Oppenshaw* was approved and applied in *Aw Yong (supra)*. He urged the court to apply the rule and confirm the amount awarded to his clients as the other defendants have been awarded the same amounts as getting up fees.

[22] It is convenient at this point to necessary to examine the case of *Aw Yong* which provides the foundation for the point taken. In that case, the plaintiffs instituted 36 separate suits in the Kuala Lumpur High Court against the first and second defendants. The plaintiffs were purchasers who had entered into sale and purchase agreements with the first defendant, who was a housing developer. The second defendant was the registered owner of the property. The 36 suits were consolidated just before the commencement of the trial at the request of the trial judge. After a full trial, the consolidated claim was allowed with costs against both the defendants. The plaintiffs then filed their bill of costs claiming a sum of RM180,000. The Deputy Registrar confined the plaintiffs' claim for getting-up to only one suit and allowed a sum of RM50,000 as getting-up fees. James Foong J (as he then was) in confirming the order of the Deputy Registrar, said at p. 820 (CLJ); p. 531 (MLJ):

> When there is a consolidation of cases for the purpose of economizing time and effort, then correspondingly the cost for getting up must be reduced and confined to only points of law and matters raised at the hearing of the consolidated cases. It should not be repeated to each of the consolidated cases, otherwise there would be a multiplicity of awards for the same amount of work and effort spent. This, I believe, is the rational of Pollock CB in *Mucklow v. Whitehead & Oppenshaw v. The Same* where a distinct exception to awarding separate costs for two actions where the subject matter litigated was substantially similar where there 'is a consolidation'. When such an event (consolidation) has occurred, the work involved in looking up and

A researching on the law must be confined only to matters raised at the hearing of the case. It would be unfair to punish a defeated party by awarding costs for getting up in each of the consolidated cases when matters were heard only at one hearing; no greater amount of work and effort were expanded on others.

B And His Lordship continued on the same page:

> Admitting that though this may be logical, Mr Yau has explained that the consolidation in this case was only effected at the last minute, just before the trial began. By then, all necessary preparations on researching the law had been completed for each
C case. I find this argument is without justification. Firstly, as illustrated above, no greater effort was expanded on looking up the same points of law which were applicable to all the cases since the relief claimed by all plaintiffs were similar and arose out of the same transaction or series of transactions.

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[23] An examination of the case shows that it does support the proposition taken by the defendant, that there is a rule which permits a solicitor who represents two or more litigants in separate actions, to be entitled to the same amount as getting-up though
E the same work was done in each case. The exception to this rule applies when these separate actions are consolidated. In *Aw Yong*, the court applied the exception and the plaintiffs were allowed to claim getting up fees in respect of only one action as the 36 actions had been consolidated and treated as one action.

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[24] In the context of the present case, it is important to note that there is also only one action that the plaintiffs have commenced against the eleven defendants herein. In the circumstance the exception to the general rule would apply. And,
G if it is applied to the facts of this case, it would necessarily preclude the defendants' solicitors from claiming payment ten times over for the same work done.

[25] I therefore agree with the submission advanced by counsel for the plaintiff that the defendants are not entitled to claim three
H times over as getting-up for the same work done. It is imperative to ensure that an unsuccessful litigants should not be oppressed by having to pay an excessive amount of costs.

[26] I would like to mention in passing, though the issue does not
I arise here, that I am not inclined to agree with the view expressed in *Oppenshaw* that a solicitor is entitled to be paid twice over for

the same work done by him where there is no consolidation of the separate actions. It is difficult to discern any justification whatsoever for this rule and does not accord with the rule that costs should not include a punitive element.

[27] Despite my view that the defendants' solicitor is only entitled to be paid for work done in respect of one of his clients, I have no option but to dismiss the plaintiffs' application for review. The same objection that the defendants are only entitled to claim for getting up fees in relation to one defendant has been taken and rejected thrice. These were decisions that could have been challenged on appeal, but this was not done. No explanation has been proffered for this omission. In the absence of an explanation, it would be reasonable to assume that the plaintiffs do not dispute the correctness of those decisions. Against this backdrop, and to avoid inconsistent decisions on the same issue, I am unable to accede to request made on behalf of the plaintiffs for the reduction of the amount awarded as getting-up fees. It would be unjust to deny the first, second and ninth defendants the same quantum of costs awarded to the other defendants in this action.

Conclusion

[28] For the aforesaid reasons, I dismiss the appeal with no order as to costs.